Supreme Court, U.S.
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NO. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

Randall C. Hauser, Petitioner

v.

United States of America, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JON R. ZULAUF
LAW OFFICES OF
FINEGOLD, ZULAUF &
ENGELHARD
1809 7th Avenue
Seattle, WA 98101
(206) 682-1114

Counsel of Record
for Petitioner

ABCD Legal Printers, Seattle, Washington

QUESTIONS PRESENTED FOR REVIEW

1. Was the petitioner denied his right to due process of law when the U.S. Court of Appeals for the Ninth Circuit upheld the District Court's Findings of Fact and Conclusions of Law which were contrary to the stipulation of the parties?

2. Did the U.S. Court of Appeals for the Ninth Circuit err when it failed to center the entrapment analysis around the element of government inducement?

3. Did the decision by the U.S. Supreme Court in Jacobson v. United States, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992) create a new reasonable suspicion requirement for government sting operations?

PARTIES TO THE PROCEEDINGS

1. UNITED STATES:

United States Attorney
Western District of Washington
Mike McKay
United States Attorney
Mark N. Bartlett
Assistant United States Attorney
800 Fifth Avenue
Suite 3600
Seattle, WA 98104
(206) 553-1967

Department of Justice
Sean Connelly
Room 2720
Washington D.C. 20530
(202) 616-0114

2. RANDALL C. HAUSER
P.O. Box 5000
Federal Correctional Institution
Sheridan, OR 97378

Represented by JON R. ZULAUF
Tower Building - 13th Floor
1809 Seventh Avenue
Seattle, WA 98101
(206) 682-1114

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I. REFERENCE TO PREVIOUS OPINIONS

The order affirming Mr. Hauser's conviction and sentence is noted at 990 F.2d 1262 (9th Cir. 1993). The unpublished opinion dated March 22, 1993 is contained in the Appendix, pp. A1-A16.

II. STATEMENT OF JURISDICTION

A. Randall C. Hauser seeks review of the United States Court of Appeals for the Ninth Circuit Order affirming his conviction dated March 22, 1993 (See Appendix pp. B17-B18) and of the Order denying his petition for rehearing dated June 29, 1993. See Appendix p. D-22.

This Court has jurisdiction to review the United States Court of Appeals for the Ninth Circuit Orders affirming the conviction and denying rehearing pursuant to 28 U.S.C. § 1254.

B. This petition for writ of certiorari is based upon the following constitutional provisions. See Appendix, p. G-27.

1) The Fifth Amendment to the United States Constitution.

III. STATEMENT OF THE CASE

Petitioner, Randall C. Hauser, was charged by Indictment in the United States District Court for the Western District of Washington on January 1, 1991, along with co-defendant Marvin Wood, with conspiracy to possess with intent to distribute 5,000 grams or more of cocaine (21 U.S.C. § 841(a)(1), 841(b)(1)(A) and 846). Count II charged attempted possession with intent to distribute 5,000 grams or more of cocaine (21 U.S.C. § 841(a)(1), 841(b)(1)(A) and 846).

Mr. Hauser was charged with these violations after a friend, Stuart Gottlieb, arranged for Mr. Hauser to be targeted by a "reverse sting" operation set up by the DEA. In order to avoid criminal charges and a prison sentence for being part of a counterfeiting ring, Mr. Gottlieb decided to help the Government's agents make criminal cases against other individuals (RP 232). Gottlieb chose to target Mr. Hauser because of the information he had about Mr. Hauser's struggle to shake his cocaine addiction and to emerge from his dire financial circumstances. This information had been acquired through friendship.

In 1979, Mr. Hauser pled guilty to conspiracy to distribute cocaine after becoming involved with drugs while he was in college at Central Washington University. After receiving a fifteen year prison sentence and an order to pay a $25,000 fine (RP 267), Mr. Hauser spent 75 months in

prison and was paroled in 1985. (RP 269). Mr. Hauser had known Gottlieb from the time they had spent together at Lompoc Prison Camp (RP 273). The two had become close, and, while their contact in recent years had been limited, Mr. Hauser still considered Gottlieb to be a good and trusted friend (RP 282).

By the summer of 1988, Mr. Hauser was working full time as a hair designer, and had experienced success in his efforts at promoting and managing local musical talent (RP 276). He felt he was completely free from the use of drugs. After undergoing drug treatment, he had not been involved in the sale or distribution of drugs for over ten years and had no intention of entering that lifestyle again (RP 266, 274-275). He made efforts to keep his distance from anyone involved with drugs. He let his family and friends know that he was clean and going to stay that way.

In the fall of 1988, two urinalyses showed positive for cocaine use, despite Mr. Hauser's denial and voluntary lie detector test which affirmed his denial. Consequently Mr. Hauser was sent back to prison for violating his parole (RP 270). Mr. Hauser was released in January, 1990 (RP 290). Shortly after his release, another urinalysis showed cocaine use. He completed drug treatment and spent ninety days in a work-release facility (RP 271).

By early November, 1990, Randy Hauser was trying to stabilize his life. He was continuing his successful efforts to stay away from the drug scene (RP 274). He was working, but his financial position was disastrous (RP 276).

Gottlieb approached Mr. Hauser in mid-November of 1990, focusing on his financial vulnerability. When the two first spoke, nothing about drugs was mentioned. They discussed their current situations and their

financial woes. When, in a subsequent conversation, Gottlieb raised the issue of purchasing cocaine, he began pressuring Mr. Hauser by emphasizing their friendship. Gottlieb needed Mr. Hauser's help to get himself out of financial problems and told Mr. Hauser, "you helped me out once, help me out again," and "you saved my life once." Phone records (see Phone Call Exhibit which was admitted into evidence at Trial Transcript, page 93) show that on November 21, Gottlieb spoke with the Secret Service for 16 minutes just moments before his first attempt to reach Mr. Hauser. Gottlieb then made three calls to the FBI before his second attempt to reach Mr. Hauser and spoke with the DEA for eight minutes before his third and fourth attempts. The phone records revealed a pattern of Gottlieb contacting the DEA before each call to Mr. Hauser.

On March 1, 1991, Mr. Hauser filed a

pretrial motion to dismiss the Indictment on grounds of outrageous government conduct [CP 30]. On April 5, 1991, an evidentiary hearing was held before the Honorable Carolyn R. Dimmick on Mr. Hauser's motion to dismiss for outrageous government conduct [CP 40, 41]. For purposes of that hearing, the Government stipulated to the facts stated by Mr. Hauser's counsel. This stipulation included the issue of whether Stuart Gottlieb was a government agent. See Appendix pp. E23-E25 and F26.

The government shortcut the pretrial hearing, eliminating the need for calling witnesses, by stipulating that Mr. Gottlieb was a "government agent." Counsel for Mr. Hauser did not call witnesses on that issue because the United States Attorney had already conceded that point for purposes of the pretrial hearing.

Judge Dimmick denied the motion to dismiss and entered Findings of Fact and

Conclusions of Law on April 17, 1991. These Findings of Fact were inconsistent with the agreed facts in that they suggested that the government played no role in motivating Gottlieb to contact Mr. Hauser. See Appendix pp. C19-C22. Mr. Hauser filed an objection to the Court's Findings and Conclusions on April 19, 1991 [CP 47].

The trial of Mr. Hauser began on April 22, 1991 and ended on April 25, 1991 [CP 55-58]. Mr. Hauser raised the affirmative defense of entrapment and the Court instructed the jury with regard to this defense. [CP 64]. The jury returned a verdict of guilty on both Counts I and II.

On May 2, 1991, Mr. Hauser moved for a new trial [CP 67] and renewed his previous motion to dismiss for outrageous government conduct. On May 28, 1991, Judge Dimmick denied both the motion for a new trial and the renewed motion to dismiss [CP 69].

Mr. Hauser appealed his conviction to

the U.S. Court of Appeals for the Ninth Circuit on January 13, 1992. In his appeal, he argued that the Court's Findings of Fact and Conclusions of Law were clearly erroneous. On March 22, 1993, the Court of Appeals found that the District Court's conclusion that Gottlieb was not a government agent was supported by the record and affirmed Mr. Hauser's conviction, reasoning that since Mr. Gottlieb was not a government agent at the time of his contact with Mr. Hauser, there could be no "outrageous government conduct" and no "entrapment as a matter of law."

On April 2, 1993, Mr. Hauser filed a petition for rehearing arguing that the Court's determination that the stipulation of the parties was not binding was, in effect, a deprivation of Mr. Hauser's right to a hearing. This petition for rehearing was denied on June 29, 1993.

IV. ARGUMENT

A. REVIEW SHOULD BE GRANTED BECAUSE THE CIRCUITS ARE DIVIDED OVER THE QUESTION OF WHEN COURTS ARE BOUND BY THE STIPULATIONS OF THE PARTIES.

It has been well established that parties may stipulate to certain facts in criminal cases. United States v. Schor, 418 F.2d 26 (2nd Cir. 1969). See also United States v. Lott, 870 F.2d 778 (1st Cir. 1989); Smith v. Blackburn, 785 F.2d 545 (5th Cir. 1986); United States v. Houston, 547 F.2d 104 (9th Cir. 1976). Stipulations freely and voluntarily entered into in criminal trials are as binding and enforceable as those entered into in civil actions. United States v. Shapiro, 879 F.2d 468 (9th Cir. 1989); United States v. Gwaltney, 790 F.2d 1378 (9th Cir. 1986), cert. denied, 479 U.S. 1104, 107 S.Ct. 1337, 94 L.Ed.2d 187 (1986).

The issue that needs to be addressed is whether stipulations between parties are to

be treated as enforceable contracts binding on the parties and the court, or whether the court's role is to go behind the agreement to its content to examine whether it comports with the facts on the record. The circuits are conflicted over this question, particularly in the context of criminal trials.

In United States v. Shapiro, 879 F.2d 468 (9th Cir. 1989), a defendant had been indicted for mail fraud and sought to prevent the use of his prior conviction for grand theft for impeachment purposes. At a pretrial hearing, the prosecution agreed that it was willing to exclude Shapiro's prior record. At trial, the prosecutor cross-examined Shapiro about his prior conviction. The court held that "the stipulation between the government and the defendant is similar in nature to a plea agreement." 879 F.2d at 479, citing United States v. Bronstein, 623 F.2d 1327, 1329

(9th Cir. 1980), cert. denied, 449 U.S. 842, 101 S.Ct. 122, 66 L.Ed.2d 50 (1980); see also United States v. Arnett, 682 F.2d 1162, 1164 (9th Cir. 1979). The court indicated that it would only be appropriate to go behind the face of the agreement if there was a good faith dispute based upon extrinsic evidence as to the meaning of the terms of the stipulation.

The Shapiro Court held that the general rule that stipulations are binding and enforceable "is especially applicable where the United States government is a party to the agreement." 879 F.2d at 471. Judicial deference to these kinds of agreements is crucial in criminal trials, the court noted, because prosecutors have a special obligation to fulfill their promises, and defendants should not be prejudiced by detrimental reliance on those promises. The court found that "Shapiro was sandbagged by the government's cross-

examination" 879 F.2d at 472, and that the district court abused its discretion by allowing this to take place. Reversing Shapiro's conviction, the court held that the government was required to abide by its agreement if it were to retry the defendant.

In Federal Deposit Insurance Corp. v. St. Paul Fire and Marine Insurance Co., 942 F.2d 1032 (6th Cir. 1991), the court held that the district court's findings of fact had to be in line with the stipulation of the parties. The court said:

> Stipulations serve the purpose of conserving judicial resources and allowing the parties to focus on truly disputed issues. Everyone benefits when parties agree to make stipulations. It saves the parties the time and money of proving facts that are not in dispute but are nonetheless necessary to the outcome of the dispute. It saves time and energy for judges and juries who don't have to hear evidence about what parties are willing to agree about. And it saves the public money, by making trials shorter

> and clearing space on the docket. In order for this system to work, however, the parties must be able to depend on stipulations. If a trial judge can, as here, ignore a stipulation of the parties, the incentive to enter the stipulations is eliminated. Worse yet, it offers a whole new ground for strategic behavior, as parties can try to get the trier of fact to pass on matters that have already been agreed to. 942 F.2d at 1038.

The court indicated that a judge might only be permitted to make a finding contrary to the stipulation of the parties if they had stipulated to patently untrue "facts," and the judge gave the parties notice of his intent. 942 F.2d at 1038 n.3. Otherwise, to prevent injustice, the court was not to look behind the agreement to examine its accuracy, but rather the trial judge was bound by the parties' stipulation.

In United States v. Houston, 547 F.2d 104 (9th Cir. 1976), a defendant stipulated to a prior conviction at trial.

Subsequently, he argued that the stipulation was entered into because of a mistake of law and thus should have been set aside. The court held that when parties have entered into stipulations as to material facts, those facts will be deemed to have been conclusively established. On this basis, the court declined to entertain the claim that the stipulation was erroneous.

In Kealy v. Harter, 682 F.2d 198 (8th Cir. 1982), the Eighth Circuit declined to look behind the face of a stipulation. The court held that the district court properly relied on a stipulation of facts where the parties contesting a provision of the stipulation did not explain why they had agreed to the provision if it was inaccurate. Without extraordinary circumstances or excuse of any kind for agreeing to it, the parties were bound by their agreement despite its inaccuracy.

Other circuits have held to the contrary, suggesting that the question of when to honor the stipulations of parties is a matter entirely within the discretion of the court. In Smith v. Blackburn, 785 F.2d 545 (5th Cir. 1986), the court looked beyond the agreement between the parties, to its accuracy in determining the trial judge had erred in rejecting the stipulation. The court said:

> Stipulations entered into between parties are to be disregarded only if accepting them would be manifestly unjust or if the evidence contrary to the stipulation was substantial. An incorrect admission of error by the state does not bind the district court and it has an independent duty to examine the record to ascertain the accuracy of the stipulation. The determination must, however, be based on the record.

785 F.2d at 549.

In PPX Enterprises, Inc. v. Audiofidelity, Inc., 746 F.2d 120 (2d Cir. 1984),

the court said that under federal law, stipulations are binding on parties and the courts. However, this general rule was subject to exceptions:

> A district court is entitled to disregard a stipulation if to accept it would be manifestly unjust or if the evidence contrary to the stipulation is substantial.

746 F.2d at 123.

The court held that the way to determine whether it was appropriate to uphold the stipulation of the parties was to look beyond the agreement itself, to its accuracy.

In Graefenhain v. Pabst Brewing Co., 870 F.2d 1198 (7th Cir. 1989), the court held that a stipulation is binding unless relief from the stipulation is necessary to prevent manifest injustice or the stipulation was entered into through inadvertence or based on an erroneous view of facts or

law. This court also suggested that the determination of whether the agreement was binding turned on the question of factual accuracy.

The question of when stipulations are binding is one that is particularly appropriate for this Court to address. First, it is the subject of a real and confusing conflict among the circuits. Second, at a practical level, it cuts to the core of the notion that the defendant is entitled to due process of law in a criminal trial. For, if it is deemed permissible that defendants rely on agreements made with the government, forego the opportunity to present testimony or cross-examine witnesses, and later those agreements are dishonored, the defendant's constitutional right to due process is called into question.

B. REVIEW SHOULD BE GRANTED TO CLARIFY THE DEFINITION OF ENTRAPMENT

It is well established that a valid entrapment defense has two elements: government inducement of the crime and a lack of predisposition on the part of the defendant to engage in criminal conduct. There is, however, a split among the circuits on the question of where the emphasis of the analysis should lie. Some circuits have held that an entrapment defense turns on the question of whether the government was the initiator of the

transaction. [1] Other circuits have held that the question of entrapment turns, not on government conduct, but on the issue of the defendant's predisposition to commit the crime. [2]

The United States Court of Appeals for the Ninth Circuit affirmed Mr. Hauser's conviction, declining to find that he was entrapped as a matter of law. The Court suggested that even if it had held that Gottlieb was a government agent, it would have focused on the question of predisposition rather than that of government

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[1] Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958); United States v. Nissen, 928 F.2d 690 (5th Cir. 1991); United States v. West, 898 F.2d 1493 (11th Cir. 1990), cert. denied, 111 S.Ct. 685, 112 L.Ed.2d 676 (1990); United States v. Ventura, 936 F.2d 1228 (11th Cir. 1991); United States v. Duvall, 846 F.2d 966 (5th Cir. 1988).

[2] Jacobson v. United States, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992); United States v. Dozal-Bencomo, 952 F.2d 1246 (10th Cir. 1991); United States v. Jones, 950 F.2d 1309 (7th Cir. 1991), cert. denied sub nom. Tolliver v. United States, 112 S.Ct. 1700, 118 L.Ed.2d 410 (1991); United States v. Knight, 917 F.2d 1 (5th Cir. 1990), cert. denied, 111 S.Ct. 533, 112 L.Ed.2d 543 (1990).

inducement. This analysis places the Ninth Circuit in accord with some circuits and in disagreement with others.

In United States v. Nissen, 928 F.2d 690 (5th Cir. 1991), U.S. Customs officials set up an undercover business to ferret out persons dealing in controlled substances and transporting them by aircraft. When Nissen was charged with exporting military aircraft parts without a license, he raised the defense of entrapment. The court found that Nissen was not entrapped, based on the fact that he was "the moving force in these negotiations." 928 F.2d at 693. The Fifth Circuit held that, "when considering an entrapment defense arising from a 'sting' operation, the critical determination is whether the criminal intent originated with the defendant or with government agents." Id.

In United States v. West, supra, West

raised an entrapment defense when he was charged with violating the federal Murder-For-Hire Statute after discussing the notion of hiring a hitman with an FBI informant. Although the court was firm that to prove entrapment, "the defendant must come forward with more than a scintilla of evidence that the government's conduct created a substantial risk that a person, other than one ready to commit the offense, would in fact commit it," id. at 1502, the focus of the analysis was on government inducement. The court held, "inducement represents more than mere suggestion, solicitation, or initiation of contact and, in fact, embodies an element of persuasion or mild coercion . . . " Id. In determining that an entrapment instruction was not necessary, the court found dispositive the fact that in each of the tape recorded conversations between West and the informant, it was West

who initiated the subject of the hitman, and not the agent.

In United States v. Ventura, 936 F.2d 1228 (11th Cir. 1991), the court focused on the government inducement prong of the analysis in determining whether there was a valid defense of entrapment. The court found that although the informant, had befriended co-defendant Perez and involved him in a narcotics sting, there was no entrapment. The court made its determination based on the fact that Perez, rather than the government informant, first suggested the transaction, that he was a willing participant from start to finish and that he consistently pressured the informant to get the deal together. The court looked at whether there was government inducement, found none, and used this determination as the basis for the finding.

Other circuits, however, have focused

on the predisposition of the defendant to commit the crime rather than on government inducement. In Jacobson v. United States, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992), this court found that the government failed as a matter of law to adduce sufficient evidence to support the jury's verdict that Jacobson was predisposed, independent of the government's acts, to commit the crime of receiving child pornography through the mail. The Jacobson court emphasized that "[i]n their zeal to enforce the law . . . government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so the government may prosecute." Id. at 1540. The message of Jacobson was that the defendant who is not predisposed to commit a crime before meeting with government agents should not be prosecuted.

In United States v. Dozal-Bencomo, 953 F.2d 1246 (10th Cir. 1991), the defendant who was charged with narcotics violations, sold heroin to a DEA agent. The Tenth Circuit said,

> [t]he critical inquiry in entrapment . . . focuses on defendant's intent or predisposition to commit the offense rather than the degree of government involvement.

952 F.2d at 1250. The court emphasized that in evaluating predisposition, "the focus centers on the defendant's state of mind before government agents suggested illegal activity." Id. at 1251.

In United States v. Jones, 950 F.2d 1309 (7th Cir. 1991), cert. denied sub nom. Tolliver v. United States, 112 S.Ct. 1700, 118 L.Ed.2d 410 (1991), the defendant's conversations regarding a planned bank robbery were recorded by a participant-

informant. The court focused on the defendant's predisposition to commit the crime, saying, "[a]lthough some courts view the entrapment defense as focusing exclusively on the government's conduct, courts in the Seventh Circuit continue to determine whether a defendant is predisposed to commit the crime . . . " Id. at 1314. In determining predisposition, the court found that "[t]he most important factor for the court to focus upon is the defendant's reluctance to commit the offense." Id.

In United States v. Knight, 917 F.2d (5th Cir. 1990), cert. denied, 111 S.Ct. 533, 112 L.Ed.2d 543 (1990), the defendant was charged with narcotics violations as a result of a reverse sting operation. In analyzing whether there had been entrapment or outrageous government conduct, the court defined entrapment as turning on the question of predisposition.

> The issue, as we have often said, is the predisposition of the accused to commit the crime, not the encouragement by the government or even the government officials serving as the sellers.

Id. at 2, citing United States v. Tobias, 662 F.2d 381, 386 (5th Cir. Unit B, 1981), cert. denied, 457 U.S. 1108, 102 S.Ct. 2908, 73 L.Ed.2d 1317 (1981).

This Court should accept review to clarify the definition of entrapment. The circuits are divided over whether government inducement, in the form of initiation of the prohibited activity by the government agent, is the linchpin of the analysis or if it is the predisposition of the defendant that is the decisive prong of the entrapment defense.

C. REVIEW SHOULD BE GRANTED BECAUSE JACOBSON V. UNITED STATES CREATED A NEW REASONABLE SUSPICION STANDARD FOR STING OPERATIONS WHICH SHOULD HAVE APPLIED TO THE CASE AT BAR

In Jacobson v. United States, 112 S.Ct. 1535 (1992), this court announced a new reasonable suspicion standard for sting operations. This holding placed the circuits, which had previously uniformly held that reasonable suspicion was not a requirement, in conflict with this court. It also announced a test which should have applied to the sting operation to which Mr. Hauser was subjected and to the assessment of his entrapment defense. [3]

In Jacobson, this court held that the government failed, as a matter of law, to adduce sufficient evidence to support the jury's verdict that the defendant Jacobson was predisposed, independent of the

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[3]In cases on direct appeal, any "newly announced rule" for criminal prosecutions must be applied retroactively. United States v. Sanchez, 944 F.2d 497 (9th Cir. 1991).

government's acts, to commit the crime of receiving child pornography through the mail. Jacobson had initially ordered from a bookstore magazines which were sexually explicit, but legal at the time of purchase. The government received Jacobson's name from the bookstore's mailing list and sent him mail from fictitious organizations in an attempt to explore his willingness to break the law. Two and a half years after the government initially received Jacobson's name from the mailing list, Jacobson ordered an illegal magazine depicting children engaging in sexual activity. The magazine had been listed in a catalog sent by one of the government's bogus organizations. Jacobson was prosecuted for ordering the

magazine. This court held that,

> [i]n their zeal to enforce the law . . . government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute.

112 S.Ct. at 1540.

The Court articulated its view that in the context of a sting operation, the suspect must be predisposed not only before the opportunity to commit the crime arose, but also before the government came on the scene. This court upheld the entrapment defense in Jacobson because "it is our view that the government did not prove that this predisposition was independent and not the product of the attention that the government had directed at petitioner." Id. at 1541. Articulating an independence requirement in the assessment of predisposition is tantamount to creating a reasonable suspicion standard that must be met before an

individual is targeted by the government. [4]

Before Jacobson, there was a consensus among the circuits that reasonable suspicion was not required before the initiation of a sting operation targeting a specific individual. The court in United States v. Luttrell, 923 F.2d 765 (9th Cir. 1991), cert. denied sub nom. Kegley v. United States, 112 S.Ct. 1558, 118 L.Ed.2d 207 (1991), held that the absence of reasoned

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[4]See Justice O'Connor's dissent in which she discusses the majority's holding that Jacobson's predisposition to the crime was not shown to be independent of government attention. "[I]n so holding, I believe the court fails to acknowledge the reasonableness of the jury's inference from the evidence, redefines "predisposition," and introduces a new requirement that government sting operations have a reasonable suspicion of illegal activity before contacting a suspect." Id. at 1544.

grounds "to believe that the defendant was involved in criminal activity" when the police institute a sting operation does not, by itself, constitute govern- mental misconduct. Similarly, in United States v. Nissen, 928 F.2d 690 (5th Cir. 1991), the Fifth Circuit held that a defendant may be targeted without sufficient evidence of any predisposition to commit the crime under investigation as long as the government does not employ a contingent fee informant and direct him to implicate specific persons. In United States v. Perez, 959 F.2d 164 (10th Cir. 1992), decided one month before Jacobson, the court held that the government need not have a reasonable suspicion of wrongdoing in order to conduct an undercover investigation of a particular person.

By contrast, United States v. Skarie, 971 F.2d 317 (9th Cir. 1992), decided after Jacobson, applied the reasonable suspicion

test to the government sting operation to determine whether there was an entrapment defense. In this case, Ms. Skarie had participated in a narcotics transaction with an undercover agent, and raised the defense of entrapment when she was charged with possession of narcotics with intent to distribute. Although Skarie had been a drug user in the past, there was evidence that she no longer used drugs and that she was, at the time she was approached by the government agents, anti-drug. The only evidence that the government presented that Skarie was predisposed, prior to the government acts intended to create disposition, was the fact that she had admitted to having used drugs in the past and the agent's testimony that he had sold an unknown quantity of drugs for her to a third party at some point in the past. The court held that "[s]uch prior acts are

insufficient to create a jury question regarding predisposition," and added, "[g]iven that, we do not believe that the disputed testimony of [the drug informant] regarding prior drug sales, standing alone, is sufficient to prove predisposition." Id. at 320-321. The court found that all the evidence of the defendant's predisposition was developed after the government informant had contacted Skarie. The court, applying Jacobson, found that the government had failed to meet its burden:

> Where evidence of 'predisposition' comes only after the government has devoted considerable time and effort to persuading the defendant, rational jurors could not say beyond a reasonable doubt that petitioner possessed the requisite predisposition prior to the government's investigation and that it existed independent of the government's many and varied approaches to the petitioner.

Id. at 321, citing Jacobson, 112 S.Ct. at 1543.

The Ninth Circuit decided the case at bar under the old definition of the predisposition prong of entrapment, and failed to implement the reasonable suspicion standard set out in Jacobson. Relying on the fact that Mr. Hauser produced money with which to purchase the subject cocaine, the Ninth Circuit found adequate support for the conclusion that Mr. Hauser was predisposed to commit the crime. This analysis does not, however, address the question of Mr. Hauser's predisposition to commit the crime before Gottlieb exerted the financial and emotional pressure that resulted in Mr. Hauser's participation. Here, the court did not ascertain that Mr. Hauser's acquisition of the necessary amount of money was independent of the contact by Gottlieb.

Like Jacobson, who was targeted without an articulable reasonable suspicion and whose acquiescence was tied to government pressure, Mr. Hauser's ability to get the required amount of money did not predate Gottlieb's contact, but was clearly done in response to the pressure exerted on him. The Ninth Circuit erred in its analysis because it did not examine the question of Mr. Hauser's predisposition at the time Gottlieb contacted him to see if there was enough evidence to satisfy the threshold requirement of reasonable suspicion mandated by Jacobson.

V. CONCLUSION

This Court should grant review because petitioner was denied due process of law when the United States Court of Appeals for the Ninth Circuit upheld the District Court's Findings of Fact and Conclusions of

Law which were contrary to the stipulation of the parties. In addition, review should be granted both to clarify the definition of entrapment and to mandate application of the reasonable suspicion standard announced in Jacobson to petitioner's case.

Respectfully submitted this 23 day of SEPTEMBER, 1993.

FINEGOLD, ZULAUF & ENGELHARD

By _____
Jon R. Zulauf
Attorneys for
Petitioner
Randall C. Hauser

No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

Randall C. Hauser, Petitioner

v.

United States of America, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX FOR PUBLICATION

JON R. ZULAUF
LAW OFFICES OF
FINEGOLD, ZULAUF
ENGELHARD
1809 7th Avenue
Seattle, WA 98101
(206) 682-1114

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RANDALL C. HAUSER, Defendant-Appellant.	No. 91-30288 D.C. No. CR-91-1-D
UNITED STATES OF AMERICA, Plaintiff-Appellant, v. RANDALL C. HAUSER, Defendant-Appellee,	No. 91-30317 D.C. No. CR-91-1-D MEMORANDUM *

Appeal from the United States District Court
for the Western District of Washington
Carolyn R. Dimmick, District Judge,
Presiding

Argued and Submitted November 4, 1992
Seattle, Washington

Before: WRIGHT, HUG, and POOLE, Circuit Judges.

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*This dispositon is not appropriate for publication and may not be cited to or by the Courts of this Circuit except as provided by 9th Cir. R. 36-3.

Randall Hauser appeals his conviction for conspiracy to possess with intent to distribute and attempted possession with intent to distribute 5000 grams of cocaine, in violation of 21 U.S.C. §§ 846 and 841(a)(1)(A). Hauser argues for reversal on the grounds of outrageous government conduct in securing his indictment, entrapment as a matter of law, and various evidentiary errors during trial. The United States cross appeals Hauser's sentence under the Sentencing Guidelines, arguing that the district court improperly departed downward from the applicable guideline range.

The district court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 18 U.S.C. §3742 and 28 U.S.C. § 1291. We affirm both the conviction and the sentence.

I.

Hauser argues that his indictment ought to be reversed because the Government employed outrageous conduct in securing it, thereby violating the requirements of Due Process. Specifically, Hauser asserts that the government's confidential informant, Stuart Gottlieb coerced Hauser into entering the subject drug transaction. The district court rejected this argument in a pretrial motion, holding that Gottlieb was not a government agent when he contacted Hauser and began to arrange the transaction.

We find that the court's conclusion is amply supported by the record. A claim of

outrageous government conduct requires, by definition, conduct by a government agent. In this case, Gottlieb contacted Hauser on his own, Hauser apparently expressed a willingness to enter a drug transaction over the course of several telephone conversations, after which Gottlieb informed the Drug Enforcement Agency (DEA). Gottlieb did not actually assist the DEA until after Hauser had assented to the transaction. Therefore, whatever conduct Gottlieb did or did not employ in securing Hauser's assent to the deal was not employed while Gottlieb was a government agent.

Additionally, we note that Gottlieb will not be considered a government agent simply because he may have expected a reward for informing the Government of Hauser's participation in the subject transaction or because he had assisted other federal authorities by providing information in

other, unrelated matters. See United States v. Busby, 780 F.2d 804, 806-07 (9th Cir. 1986).

Hauser asserts that the Government stipulated during the pretrial motion that Gottlieb was its agent at the time and that the issue is therefore foreclosed. We are not persuaded that the Government made such a stipulation. Moreover, the court explicitly held to the contrary. Hauser has not pointed to any evidence which demands our reversal of that holding.

II.

Hauser argues that his conviction should be reversed because he was entrapped as a matter of law. Relying again on the premise that Gottlieb was a government agent, Hauser argues that Gottlieb induced him to enter a drug transaction which he was otherwise not disposed to enter. After

receiving instructions on the entrapment defense, the jury apparently rejected it by finding Hauser guilty. For the first time on appeal, Hauser asserts he is entitled to the defense as a matter of law. We disagree.

The affirmative defense of entrapment has two elements: (1) government inducement of the crime and (2) the absence of predisposition on the part of the defendant. United States v. Skarie, 971 F.2d 317, 320 (9th Cir. 1992).

In order to establish the first element as a matter of law, Hauser would have to point to "undisputed evidence making it patently clear that an otherwise innocent person was induced to commit the illegal act by trickery, persuasion or fraud of a government agent." United States v. Hart, 963 F.2d 1278, 1283 (9th Cir. 1992) (citation omitted). The evidence of

government inducement in this case is far from undisputed. As discussed above, the evidence strongly suggests that Gottlieb was not a government agent when he approached Hauser. We find therefore, that Hauser is unable to establish the first element as a matter of law.

In order to establish the second element as a matter of law, we would have to conclude that "viewing the evidence in the light most favorable to the Government, no reasonable jury could have concluded that [Hauser] was predisposed to commit the charged offenses." Id. (citations omitted). The Supreme Court has noted that where the defendant is simply provided with the opportunity to commit a crime, the "ready commission of the criminal act amply demonstrates defendant's predisposition." Jacobson v. United States, 112 S.Ct. 1535, 1541, 922 U.S. LEXIS 2117 at 17. By itself,

the undisputed fact that Hauser produced $110,000 with which to purchase the subject cocaine adequately supports a conclusion that Hauser was predisposed to commit the crime. Given this and other facts, the evidence was not so clear that the jury was required to conclude that Hauser had not been predisposed. We conclude, therefore, that Hauser has not established the second element as a matter of law.

Hauser asserts that his case is analogous to two others in which courts have found entrapment as a matter of law, Jacobson and Skarie. We are not persuaded. First, neither of these cases involved disputed questions of government inducement. Second, both involved extraordinary pressure by government agents which was not involved here. In Jacobson, the Supreme Court concluded that the defendant's willingness to commit the crime was the result of 26

months of government efforts, including promotional material from five fictitious organizations and letters from a bogus pen pal. 113 S.Ct. at 1542. In Skarie, the Government's confidential informant used graphic threats of violence against the defendant and her family to induce her participation in a drug deal. 971 F.2d at 321. In our view, none of Hauser's allegations implicate the kind of extraordinary activities involved in the cited cases.

III.

Hauser argues that his conviction should be reversed because the district court excluded testimony of Hauser's statements to three witnesses which would have demonstrated that Hauser was in poor financial shape when approached by Gottlieb, that he was committed to staying away from

drug dealing, and that he entered the drug transaction because Gottlieb persuaded him to do so. Hauser purportedly sought introduction of this evidence to support the proposition that he was not predisposed to commit the crime. Though the evidence would have been hearsay, Hauser insists that the evidence should have been admitted under the state of mind exception, Fed. R. Evid. 803(3).

We will reverse a district court's evidentiary ruling "only where there has been an abuse of discretion, and only if the evidentiary error would have more likely than not affected the verdict." United States v. Faust, 850 F.2d 575, 585 (9th Cir. 1988). We conclude that there has been no such abuse of discretion.

During the direct examination of witness Nicole Moisan, Hauser's attorney never attempted to elicit the testimony

which Hauser now claims was excluded. There were not objections or offers of proof during her examination. During the direct examination of witness/co-defendant Marvin Wood, the Government's attorney made several hearsay objections to testimony concerning an agreement between Wood and Hauser. However, as with Moisan, Hauser's attorney never attempted to elicit from Wood the testimony which Hauser now claims Wood would have provided.

Only during the direct examination of Douglas Steven Hauser did Hauser's attorney actually seek the admission of testimony which Hauser now claims was improperly excluded: statements by Hauser expressing a desire to stay away from cocaine. In determining whether statements will qualify under the state of mind exception, a court must consider "contemporaneousness, chance for reflection, and relevance." Faust, 850

F.2d at 585. Other than offering the content of the statements Hauser's attorney offered no details about the circumstances under which these statements were made. Given the limited foundation provided to the court, we cannot conclude that the court abused its discretion by denying admission of the hearsay.

IV.

Hauser argues that the district court erred by allowing the Government to admit evidence of various past "bad acts" which hauser committed. Hauser does not rely upon a rule of evidence, but rather Local Rule 48(b). This rule requires the Government to provide the defendant notice before introducing bad act evidence pursuant to Fed. R. Evid. 404(b), it the defendant has given notice that it will pursue an entrapment defense. Hauser contends that

because he gave adequate notice of his entrapment defense, the court ought not have admitted the prior bad acts evidence of which he did not receive notice.

Hauser cites several instances in which this bad act evidence was admitted. In only one instance did Hauser's attorney object--when Hauser was questioned about a false Canadian driver's license he had once used. The court overruled the objection but not on the basis of Fed. R. Evid. 404(b). Rather, the court responded: "Counsel, your witness has taken the stand and this is proper cross-examination. I will instruct the jury what they can use as information. I'll give a limiting instruction." In a subsequent order, the court underscored that the testimony had been admitted to attack the defendant's credibility.

"The district court 'has a large measure of discretion in interpreting and

applying' its own local rules." Los Angeles Memorial Coliseum Comm'n v. City of Oakland, 717 F.2d 470, 473 (9th Cir. 1983) (quoting Lance, Inc. v. Dewco Services, Inc., 422 F.2d 778, 784 (9th Cir. 1970)). Even if the testimony was theoretically admissible under Fed. R. Evid. 404(b), it was reasonable for the court to identify other grounds and conclude that its local rule did not apply. We conclude, therefore, that the district court did not abuse its discretion by admitting the evidence without notice. Likewise, those admissions of alleged bad act evidence which are disputed for the first time on appeal, do not constitute plain error.

V.

Hauser argues that the court erred by admitting a number of telephone conversations between himself and Gottlieb.

The conversations were recorded by Gottlieb at the behest of the DEA. Hauser contends that it was unfair to allow the Government to admit tape recordings of a few incriminating conversations, when there were dozens of others which were not recorded and which would have been exculpatory.

The only authority cited by Hauser is an Eighth Circuit case which suggested that a tape recording with substantial, inaudible portions might be excludable. United States v. Bell, 651 F.2d 1255, 1259 (8th Cir. 1981). Hauser argues that like a partially audible audio tape, the jury in his case "heard" only some of many conversations which took place between him and Gottlieb. Hauser concludes that the jury therefore may have gotten an incorrect or confused impression.

We are not persuaded. The Bell case actually affirmed the district court's

admission of recordings which were of poor quality. More importantly, the analogy is simply inapt. Bell discussed the problem of recordings whose substance could not be ascertained reliably -- not that audible portions might be incriminating and inaudible portions exculpatory. Hauser, moreover, cited no authority which justifies the exclusion of persuasive, incriminating evidence simply because the defense is unable to produce evidence which might rebut it. We conclude, therefore, that the court committed no error by admitting the tape recordings.

VI.

We have carefully considered each of the additional arguments presented by Hauser in his pro se, supplemental brief. We conclude that all of them lack merit.

VII.

The government challenges the sentence which the district court imposed on Hauser. The district court determined that Hauser was a career offender under section 4B1.1 of the Sentencing Guidelines and the applicable guideline sentence was 292-365 months. Departing on the ground that the career offender enhancement overstated Hauser's criminal history, the district court sentenced Hauser to 188 months. The Government argues on appeal that the district court based its departure on impermissible grounds, failed to specifically explain its reasons for departing, and departed unreasonably.

Departure from the career offender enhancement is permissible where the "defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal

history or the likelihood that the defendant will commit further crimes." U.S.S.G. § 4A1.3, policy statement; United States v. Lawrence, 916 F.2d 553, 554-55 (9th Cir. 1990).

During Hauser's sentencing hearing, the court stated: "I would agree that being labeled as a career criminal overstates the situation that you are facing today. I will depart from the career criminal status, to take into consideration what the guidelines would have been not for the career criminal status. . . ." In light of the section 4A1.3 policy statement and our decision in Lawrence, we are satisfied that the court departed on permissible grounds.

Arguing that the district court's explanation of its departure was not sufficient, the government cites United States v. Wells, in which we held that a court did not satisfy its obligation to

explain an upward departure by providing "a general recitation that the defendant's criminal history category or offense level underrepresents, in the sentencing court's opinion, the defendant's criminal record or the seriousness of the charged offense." 878 F.2d 1232, 1233 (9th Cir. 1989).

After reviewing the transcript of the sentencing hearing, however, we conclude that the court' explanation was more than a "general recitation." In justifying its sentence, the court stated "I would agree that being labeled as a career criminal overstates the situation." It is patently obvious to us that by making this statement, the court was assenting to those grounds for departure from the career criminal category which had just been articulated by Hauser and his counsel. Those explanations included the unlikelihood that Hauser would repeat his offense, his lack of anti-social

attitudes, his non-violent character, and the length of time since his last offense. We conclude, therefore, that the court's explanation was sufficient. We also conclude that the court's departure was reasonable given the circumstances.

VII.

Hauser's conviction and sentence are both **AFFIRMED.**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 91-30288
v.	)	D.C. No. CR-91-1-D
RANDALL C. HAUSER, Defendant-Appellant.	)	
UNITED STATES OF AMERICA, Plaintiff-Appellant,	)	No. 91-30317
v.	)	D.C. No. CR-91-1-D
RANDALL C. HAUSER, Defendant-Appellee,	)	

APPEAL FROM the United States District Court For the Western District of Washington (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered: 03/22/93

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. RANDALL C. HAUSER, Defendant.	NO. CR9101D FINDINGS OF FACT, CONCLUSIONS OF LAW, & ORDER

THIS MATTER is before the Court on defendant Randall C. Hauser's motion to dismiss indictment on the basis of outrageous government conduct.[1] After hearing oral argument and taking evidence in open court April 5, 1991, this Court

[1]Defendant Hauser had also moved (1) to bar use of his prior convictions and (2) to suppress evidence. These two motions are mooted by the government's indication that it will not be using this information or evidence.

concludes that the government's conduct was not outrageous.

For the sake of argument, the Assistant U.S. Attorney assigned to this case, assumed that Hauser's factual assertions were correct. Thus, he argued that even with this assumption, the government's conduct could not be said to be outrageous. See, e.g., United States v. Bogart, 783 F.2d 1428 (9th Cir. 1986).

Additionally, this Court heard sworn testimony from Drug Enforcement Administration Agent Mark Hedman and U.S. Secret Service Agent James Todak, who were cross-examined by Hauser's counsel. As a result, this Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Stuart Gottlieb contacted Randall Hauser in mid to late November, 1990. This initial contact was made by Gottlieb

acting on his own and not under the direction or control of government agents.

2. At the time of this contact, Hauser had not been targeted by the Drug Enforcement Administration (DEA).

3. Hauser eventually agreed to purchase 5 kilograms of cocaine for $110,000. The 5-kilo amount was a mutually arrived at figure acceptable to both Gottlieb and Hauser. DEA's interest in obtaining a 5-kilo order was primarily aimed at seizing the largest possible amount of cash during the reverse delivery.

4. No government agent put any undue pressure on Hauser or utilized any objectionable methods in the investigation that culminated in Hauser's arrest on December 13, 1990.

CONCLUSIONS OF LAW

1. The government investigation which culminated in the defendant's arrest on

December 13, 1990, did not involve any outrageous government conduct.

2. The amount of cocaine offered to Hauser by Gottlieb was not motivated by the government's desire obtain a particular minimum sentence.

The Clerk of the Court is directed to send copies of the Findings of Fact, Conclusions of Law and Order to all counsel of record.

DATED this 17th day of April, 1991.

/s/ CAROLYN R. DIMMICK
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RANDALL C. HAUSER, Defendant-Appellant.	NO. 91-30288 D.C. NO. CR91-1-D
UNITED STATES OF AMERICA, Plaintiff-Appellant, v. RANDALL C. HAUSER, Defendant-Appellee.	NO. 91-30317 D.C. No. CR91-1-D
	ORDER

Appeal from the United States District Court
for the Western District of Washington

Before: WRIGHT, HUG, and POOLE, Circuit Judges

The petition for rehearing filed on April 5, 1993 is hereby DENIED.

REPORT OF PROCEEDINGS, pp. 5-7

MR. ZULAUF: Your Honor, we believe that the -- perhaps what I should do is start out by giving a summary of what I expect the evidence would show.

THE COURT: Go ahead.

MR. ZULAUF: And that is we expect that the evidence would show that Randy Hauser met Stu Gottlieb, who is the Government's confidential informant, while they were in prison; that after the two of them got out of prison, that Stu Gottlieb got into trouble with the law. We believe that the evidence would show that he was in fact investigated by the Government authorities, that Stu Gottlieb, we believe, then reached an agreement to cooperate with the Government, and that as part of that cooperation, he was promised benefits if,

indeed, he were to assist in making an arrest of someone on a major drug transaction. We believe that as part of that cooperation and as part of that deal that, indeed, Mr. Gottlieb called Randy Hauser in November of 1990. We believe that at that point, through a number different techniques, he convinced Randy Hauser to do a drug deal. Among the techniques that he used was relying on the good friendship that the two of them had. Among the techniques that he used was to comment to Randy Hauser that he was broke, that he had no money, that he was in desperate financial straits, and that he needed Randy Hauser to help him out. Among the techniques that he used was to exploit the fact that Randy Hauser was going through severe economic problems including that the federal government had attempted to garnish his wages and to pay the $25,000 fine that Judge Voorhees had earlier imposed upon him. And so the

federal government was now threatening to garnish his wages.

With that backdrop, what the confidential informant then did was he went to Randy Hauser and he gave him an extraordinarily low price for cocaine and basically persuaded him that in one shot Randy Hauser could come out of the economic depression that he was going though. He could help his friend out and he could help his friend out of severe economic problems as well. We believe that the evidence would show that prior to November, 1990, the November, 1990 phone calls between Gottlieb and Randy Hauser, that the Government had absolutely no evidence that Randy Hauser was involved in any sort of drug dealing, drug transactions, possession of drugs or anything of the sort. We believe that the Government had no evidence that he was using, selling or manufacturing drugs at the

time that Randy Hauser was targeted by the government agent Stu Gottlieb for prosecution. We believe that the evidence would show that Stu Gottlieb, at the direction of government agents, then persuaded my client, Randy Hauser, to sell drugs or to participate in this drug transaction and persuaded him to participate at a level of five kilograms specifically in order to get the amount up to the mandatory minimum level.

We believe that the evidence would show that the Government then rewarded Mr. Gottlieb for all of that cooperation and all of his efforts . . .

REPORT OF PROCEEDINGS, p. 13

MR. ZULAUF: It is my understanding that the Government, for purposes of this argument then, has accepted my offer of proof except with regard to this one point?

THE COURT: That's correct.

Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

21 U.S.C. § 841 Prohibited acts A

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. § 841 Prohibited acts A

(b) Penalties. Except as otherwise provided in section 418, 419, or 420 [21 USCS § 859, 860, or 861], any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(a) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin; (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of --

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and sales of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers;' or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram

or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marijuana plants

regardless of weight; or (viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a

violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 418, 419, or 420 [21 USCS § 859, 860, or 861] after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with

the preceding sentence. For purposes of this subparagraph, the term "felony drug offense" means an offense that is a felony under any provision of this title or any other Federal law that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances or a felony under any law of a State or a foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of a least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place

on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

21 U.S.C. § 846 Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.